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The Absolute Prohibition of Torture and Ill-Treatment

By David Weissbrodt¹

The President, the Secretary of State, and other U.S. government officials have repeatedly assured the world that the United States does not engage in "torture." Whenever they try to issue such statements, the critical listener must ask such questions as "What do they mean by torture?" Have they so narrowly defined "torture" as to ask the listener to overlook the mounting evidence of extremely brutal treatment which U.S. personnel have perpetrated against detainees in Afghanistan, Guantánamo, Iraq, and other secret detention facilities? Many detainees held by the U.S. have been subjected to ill-treatment that would, under international definitions and jurisprudence, qualify as torture.

Further, the international prohibition extends not only to torture, but also to "cruel, inhuman or degrading treatment or punishment." When U.S. officials repeatedly deny that they are engaging in torture, the critical listener should be wondering: Are they trying to ask the listener to overlook the obligation of the U.S. to prevent and protect against "cruel, inhuman or degrading treatment or punishment"? When the U.S. ratified the principal treaties forbidding torture and cruel, inhuman, or degrading treatment or punishment, the U.S. interposed an "understanding" that tried to further define "cruel, inhuman or degrading treatment or punishment" by refer-

ring to the U.S. Constitution's fifth, eighth, and fourteenth amendments. The U.S. initially explained that reservation as necessary to help clarify the vagueness of the phrase "cruel, inhuman or degrading treatment or punishment," but high level U.S. officials, including the Secretary of Defense, have instructed U.S. personnel in Afghanistan, Guantánamo, Iraq, and other secret detention facilities to engage in ill-treatment that is forbidden by both treaties and authoritative interpretations of the U.S. Constitution. The U.S. also did not attempt to interpose any reservation or restriction on its obligation under the Civil and Political Covenant: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

The latest lame defense of U.S. ill-treatment is that the U.S. Constitution does not apply to actions by government officials outside the United States. Not only is this newly concocted excuse not consistent with the object and purpose of the treaties that the U.S. was purporting to ratify, but treaty obligations apply to any person who is within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained. The U.S. also did not attempt to interpose any reservation or

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restriction on its obligation under the Civil and Political Covenant: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

While visiting Europe on October 7, 2005, Secretary of State Condoleezza Rice declared for the first time that the U.S. as "a matter of policy" "prohibits all its personnel from using cruel or inhuman techniques in prisoner interrogations, whether inside or outside U.S. borders."² Her statement was intended to assuage concerns expressed by European nations and to avoid legislation proposed by Senator John McCain to reaffirm as a matter of legal obligation that U.S. officials at home and abroad will not engage in "cruel, inhuman or degrading treatment or punishment." The Secretary of State further stated that the U.S. had not engaged in "torture," but could not make the same statement about other forms of forbidden ill-treatment.

The objective of this article is to set forth the absolute prohibition in human rights treaties, the Geneva Conventions, and other international humanitarian/human rights law against both torture and cruel, inhuman, or degrading treatment or punishment, followed by a discussion about how that prohibition applies to the United States.³

Development of the Prohibition of Torture and Cruel, Inhuman, or Degrading Treatment or Punishment

The first and most visible international pronouncements on this subject occurred in 1948 and 1949—following the close of hostilities in World War II and the Holocaust. In those days, the community of nations was trying to bind the wounds of war and build a new global structure that would prevent another such catastrophe with about 60 million killed. In some ways you could say that they were closing the door after the horse had left the paddock. But they also were foresightful in

understanding that safeguards were necessary to help prevent another world war and protect human rights.

In 1948 the Universal Declaration of Human Rights was adopted by the U.N. General Assembly as the most authoritative international definition of human rights and as a contemporaneous interpretation of the treaty obligations of all U.N. member states to "take joint and separate action" to promote "universal respect for, and observance of, human rights...." Article 3 of the Universal Declaration proclaims: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

A year later in 1949, the Third Geneva Convention on the Protection of Prisoners of War declared in Article 17 as to international armed conflicts:

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted or exposed to any unpleasant or disadvantageous treatment of any kind.⁴

Similarly, the Fourth Geneva Convention on the Protection of Civilian Persons, also of 1949, in Article 32 as to international armed conflicts, including periods of military occupation, provides:

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but

also to any other measures of brutality whether applied by civilian or military agents.⁵

Not only do the Geneva Conventions forbid torture and other ill-treatment in those terms, but they also declare "torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health" to be grave breaches.⁶ Such grave breaches, if committed during international armed conflicts, are subject to universal criminal jurisdiction as to which each of the 188 nations that have ratified the Geneva Conventions (including the United States) are obligated to bring perpetrators, "regardless of their nationality, before its own courts."⁷

The Geneva Conventions of 1949 deal not only with international armed conflicts between High Contracting Parties, but also cover non-international armed conflicts in Common Article 3, which states: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely."⁸ Common Article 3 prohibits "at any time and in any place whatsoever" certain acts, such as:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . . [and]

(c) Outrages upon personal dignity, in particular, humiliating and degrading treatment....

The next major step in establishing an international bulwark against torture occurred when the Universal Declaration of Human Rights of 1948 was transposed into treaty obligations by the International Covenant on Civil and Political Rights of 1966.⁹ Article 7 of the Civil and Political Covenant repeated precisely Article 3 of the Universal Declaration, but then added one further prohibition

deriving from the trial of the Nazi doctors at Nuremberg:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

The Civil and Political Covenant further provides that while some rights may be the subject of derogation during a "time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed," there are certain provisions of the Covenant that are not subject to derogation at any time by any of the 154 States Parties, including the United States. One of those nonderogable provisions is Article 7 on torture and other ill-treatment.

The Human Rights Committee—the international body that monitors the implementation of the Covenant on Civil and Political Rights—has provided some guidance on what treatment constitutes a violation of Article 7. While not drawing a definite distinction between treatment that amounts to torture and that which constitutes cruel, inhuman, or degrading treatment, the Committee has determined that beatings;¹⁰ electric shocks;¹¹ mock executions;¹² forcing prisoners to stand for prolonged periods;¹³ incommunicado detention;¹⁴ and denial of food, water, and medical care for an extended period of time¹⁵ violate Article 7 as either torture and/or cruel, inhumane, or degrading treatment.

The absolute treaty prohibition of torture¹⁶ was reinforced in 1984 by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁷ which has now been ratified by 139 nations, including the United States. Article 1 of the Convention Against Torture defines torture as

any act by which severe pain or suf-

fering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Convention against Torture not only calls for States Parties to prevent acts of torture, but it also provides in Article 2(2):

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

Furthermore, Article 2(3) makes clear that "An order from a superior officer or a public authority may not be invoked as a justification of torture."

Article 3 of the Torture Convention further provides that *no person shall be expelled, returned, or extradited "to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."* (Emphasis added.) Article 4 establishes *criminal responsibility not only for "all acts of torture," but also for attempts to commit torture and complicity in torture*. Articles 5 to 9 call for criminal jurisdiction over nationals who are alleged to have committed torture as well as acts of torture committed in the territory of a State party or against one of its nationals. An alleged perpetrator must either be tried or extradited to a

State that can establish jurisdiction over the case. States Parties shall afford each other mutual assistance in investigating and establishing criminal jurisdiction.

The Committee Against Torture—the international body that monitors the implementation of the Convention Against Torture—has determined that several methods of interrogation constitute torture as defined by Article 1 of the Convention. In its concluding remarks on the periodic report submitted by Israel in 1997, the Committee decided that the following acts may be considered torture, particularly when used in combination: (1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill.¹⁸ The Committee also considered these methods to constitute cruel, inhuman, or degrading treatment.

The European Court of Human Rights has offered additional guidance regarding the meaning of torture and other ill-treatment. Article 3 of the European Convention on Human Rights states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."¹⁹ While Article 3 of the European Convention is similar to Article 7 of the Civil and Political Covenant, the two provisions are not identical. In *Ireland v. United Kingdom* (1978), the Court ruled that five interrogation methods used by the United Kingdom in its counter-terrorism efforts against the IRA violated Article 3, but did not constitute torture. The techniques included protracted standing against the wall on the tip of one's toes; covering the suspect's head throughout the detention (except during the actual interrogation); exposing the suspect to powerfully loud noise for a prolonged period; the deprivation of sleep; and the deprivation of food and water. The Court attempted to distinguish torture from inhuman or degrad-

ing treatment:

In the Court's view, this distinction derives principally from a difference in the intensity of the suffering inflicted. The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 (art. 3) of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between 'torture' and 'inhuman or degrading treatment', should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.²⁰

Further, the Court introduced the idea of "minimum threshold of severity," reasoning that "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc."²¹

In *Ireland v. U.K.*, the Court did not, in contrast with the European Commission, consider the five methods to be torture, the suffering having not met "sufficient threshold of severity." The Commission had unanimously considered the combined use of the five methods to amount to torture, on the grounds that (1) the intensity of the stress caused by techniques creating sensory deprivation "directly affects the personality physically and mentally"; and (2) "the systematic application of the techniques for the purpose of inducing a person to give information shows a clear resemblance to those methods of systematic torture

which have been known over the ages...a modern system of torture falling into the same category as those systems applied in previous times as a means of obtaining information and confessions."²² Supporting the Commission's reasoning in *Ireland v. U.K.*, the Court ruled in *Ilhan v. Turkey* (2000) that in order for an act to be considered torture, it must be committed with certain intent:

In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating.²³

Further, in *Tyrer v. United Kingdom* (1978), the Court reinforced "hierarchical" interpretation of Article 3, attempting to distinguish acts of torture from acts of inhumane treatment and acts of degrading treatment based upon a threshold of severity: torture presents a higher degree of seriousness than inhumane treatment, which is more severe than degrading treatment.²⁴

In its most significant decision on torture and ill-treatment since *Ireland*, the European Court in *Selmouni v. France* (1999), noted that the Court's view on these issues was evolving with time so that the kinds of conduct that might have been considered ill-treatment in 1987 might eventually be viewed as torture. The Court ruled that a range of factors come into play when establishing whether a victim's pain or suffering is so severe as to constitute "torture," as distinct from other prohibited ill-treatment. According to *Selmouni*, determining whether the treatment in a particular case constituted "torture" depends on all

the circumstances of the case.²⁵ The Court stressed the fact that:

[T]he [European Convention on Human Rights] is a living instrument which must be interpreted in the light of present-day conditions...and that certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in the future....[T]he increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.²⁶

In respect to persons deprived of their liberty, in *Tomasi v. France* (1992), the Court ruled that "any use of physical force in respect of a person deprived of his liberty which is not made strictly necessary as a result of his own conduct violates human dignity and must therefore be regarded as a breach of the right guaranteed under Article 3 of the Convention. At the most the severity of the treatment is relevant in determining, where appropriate, whether there has been torture."²⁷ The Court, however, has demonstrated in several judgments a reluctance to find prison conditions to be in breach of Article 3, perhaps because of the high burden that would be placed on very poor countries.²⁸

The prohibition of torture or inhuman treatment has become an important factor in evaluating the permissibility of deportations. The Court ruled in *Soering v. United Kingdom* (1989) that Article 3 prohibits the extradition of a person who is threatened with torture or inhuman or degrading treatment or punishment in the requesting country. Extradition in such circumstances would, according to the Court, "plainly be contrary to the spirit and intent of the Article" and would "hardly

be compatible with the underlying values of the Convention."²⁹ In two cases decided in 1991, the Court held that the same considerations apply to expulsion cases.³⁰

Important, Article 3 protects against torture and ill-treatment irrespective of what a person has done or has been accused of doing, even if an individual is a suspected terrorist. In *Chahal v. the United Kingdom* (1996), for example, the U.K. wished to deport Mr. Chahal to India because his alleged terrorist activities posed a risk to the national security of the U.K. The Court, however, confirmed that, "Article 3 enshrines one of the most fundamental values of democratic society....The Court is well aware of the immense difficulties faced by States in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct."³¹

The first time that the Court made a finding of torture was in *Aksoy v. Turkey* (1996). In that case, the Court found that, while held in police custody, Mr. Aksoy was subjected to what is known as "Palestinian hanging." The Court expressed its view that this treatment could only have been deliberately inflicted. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. In addition to the severe pain which it must have caused at the time, the medical evidence shows that it led to a paralysis of both arms which lasted for some time. The Court considers that this treatment was of such a serious and cruel nature that it can only be described as torture.³²

Since then, the Court has ruled that treatment such as rape and sexual assault by the police of a detainee,³³ and severe beating by the police of a detainee,³⁴ amount to torture. In *Assenov v. Bulgaria*, the Court concluded that a violation of Article 3 had occurred, not for ill-treatment *per se* but for a failure to carry

out effective official investigation on the allegation of ill treatment. The Court recognized that

circumstances, where an individual raises an arguable claim that he has been seriously ill treated by the police or other such agents of the State, unlawfully and in breach of Article 3, that provision, read in conjunction with Article 1 of the Convention "to secure everyone within their jurisdiction the rights and freedoms in the Convention," requires by implication that there should be an effective official investigation. This obligation should be capable of leading to the identification and punishment of those responsible. If this is not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.³⁵

The Statute of the International Criminal Court³⁶ which has been ratified by 99 nations (although not the United States) further establishes criminal jurisdiction over war crimes and crimes against humanity. It defines crimes against humanity to include torture and other "inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." The Statute also gives the ICC "war crimes" jurisdiction over "[t]orture or inhuman treatment, including biological experiments; ... [and] Wilfully causing great suffering, or serious injury to body or health."

The prohibition against torture and other ill-treatment has become so widely accepted as a matter of legal obligation that many courts now consider the prohibition to qualify

not only as a matter of customary international law, but also an even more forceful principle of *jus cogens*, that is, a preemptory norm of international law that would even trump treaty obligations. For example, the well-respected Restatement of the Foreign Relations Law of the United States declares in regard to the customary international law of human rights that:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones

- (a) genocide,
- (b) slavery or slave trade,
- (c) the murder or causing the disappearance of individuals,
- (d) torture or other cruel, inhuman, or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) a consistent pattern of gross violations of internationally recognized human rights.³⁷

Application of the Prohibition of Torture and Ill-treatment to the United States

U.S. Reservations to Human Rights Treaties and their Validity

Given all these clear and unequivocal legal principles prohibiting torture and ill-treatment, we need to review their application to the United States. The United States is a party to most of the relevant treaties, that is, the U.N. Charter as elaborated by the Universal Declaration of Human Rights, the Geneva Conventions, the Covenant on Civil and Political Rights, and the Convention against Torture. In ratifying two of those treaties, the U.S. interposed reservations and an understanding that purported to limit their application to the U.S. For example, in ratifying the Civil and Political Covenant, the U.S. submitted a reservation

(3) That the United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.³⁸

Similarly, in ratifying the Convention Against Torture, the U.S. submitted a reservation

That the United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.³⁹

The U.S. further submitted an understanding to the Convention Against Torture stating:

(a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration

or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

In order to be valid, a reservation must be consistent with the object and purpose of a treaty. The Human Rights Committee and the Committee against Torture are the two institutions responsible for implementing the Civil and Political Covenant and the Convention against Torture, respectively. The Human Rights Committee reviewed the first U.S. report under the Civil and Political Covenant in 1995 and declared:

The Committee regrets the extent of the State party's reservations, declarations and understandings to the Covenant....The Committee is also particularly concerned at reservations to...article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.⁴⁰

Similarly, in reviewing the U.S. report under the Convention against Torture, the Committee against Torture expressed its concern about the "reservation lodged to article 16, in violation of the Convention, the effect of which is to limit the application of the Convention...."⁴¹ The U.S. in its report to the Committee against Torture sought to reassure the Committee that the principal reason for the reservation related to the term "degrading treatment," which the U.S. found to be vague and ambiguous. The U.S. also indicated that the federal Constitution and interpretations of the Constitution "provide extensive protections against cruel and inhuman punishment, and these protections reach much of the con-

duct and practice to which article 16 is in fact addressed."⁴²

It should be noted that despite the efforts of the U.S. to limit the application of the prohibition of cruel, inhuman, or degrading treatment or punishment, the United States failed to interpose any reservation or understanding to Article 10 of the Civil and Political Covenant that provides: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." As we consider the further conduct of the United States in Afghanistan, Guantánamo, and Iraq, we should keep that provision in mind.

Application of the Humanitarian Law Prohibition of Torture and Ill-Treatment to the United States with regard to al Qaeda and Taliban Detainees

President George W. Bush on February 7, 2002, declared with regard to the "Humane Treatment of al Qaeda and Taliban detainees" that:

Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva....The United States will hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with

applicable law.⁴³

On the one hand, this statement appears to commit the United States military to treating detainees humanely and appears to be consistent with the traditional respect of the United States for human rights. On the other hand, a closer reading reflects a bold and treacherous attack on the international legal prohibition of torture and other ill-treatment. President Bush says that al Qaeda and Taliban detainees are "not legally entitled to" be treated humanely. Further, they will be treated humanely consistent with the Geneva Conventions only "to the extent appropriate and consistent with military necessity." There is no qualification in the Geneva Conventions for military necessity with regard to the prohibition of torture or ill-treatment. There is no qualification of any kind with regard to the prohibition of torture and cruel, inhuman, or degrading treatment in the Convention against Torture or the Civil and Political Covenant, which President Bush did not even mention.

What could have been the basis for President Bush's disregard of U.S. international law obligations? In his February 7, 2002, declaration, President Bush indicated his reliance upon the Department of Justice opinion of January 22, 2002, that none of the provisions of the Geneva Conventions apply to al Qaeda.

As to international armed conflicts, Article 2 of the Geneva Conventions indicate that those treaties "apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." The Geneva Conventions also "apply to all cases of partial or total occupation." Hence, the Geneva Conventions clearly apply to the armed conflicts in Afghanistan and Iraq, because Afghanistan, Iraq, and the United States are High Contracting Parties, that is, states that

have ratified the treaties.⁴⁴

As to al Qaeda, however, President Bush and the Justice Department opinion of January 22nd are correct in that the al Qaeda is not a state and has certainly not ratified the Geneva Conventions. But President Bush went on to say:

I also accept the legal conclusion of the Department of Justice and the recommendation of the Department of Justice that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and Common Article 3 applies only to "armed conflict not of an international character."

In making this finding, President Bush and the Department of Justice ignored the authoritative commentary of the International Committee of the Red Cross⁴⁵ in regard to Common Article 3 and the overall approach of the Geneva Conventions which is to cover all armed conflicts whether international or national. The ICRC Commentary states that Article 3 represents "the minimum which must be applied in the least determinate of conflicts." Common Article 3 was intended to reflect the "few essential rules" that governments should follow in peacetime and in war as well as in dealing with common criminals or rebels. The drafters of the Geneva Conventions intended that Common Article 3 would protect those basic and fundamental rights that deserve respect at all times.⁴⁶

In April 2005 the International Committee of the Red Cross concluded a multi-year project in which it worked with the most distinguished international law experts from the entire globe to study the law and practice of all nations in the world with regard to humanitarian law, that is, the law of armed conflict. The ICRC study found that customary inter-

national humanitarian law includes the following globally applicable rule:

Rule 90: Torture, cruel or inhuman treatment and outrages on personal dignity, in particular humiliation and degrading treatment, are prohibited.

In drawing this conclusion, the ICRC referred to Article 75 of Additional Protocol I to the Geneva Conventions.⁴⁷ Article 75 covers "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the [Geneva] Conventions." Accordingly, if there were a gap between the international armed conflicts covered by Article 2 of the Geneva Conventions and the basic principles of Article 3, Article 75 would supply a standard. Article 75 states

The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

- (a) Violence to the life, health, or physical or mental well-being of persons, in particular:
 - (i) Murder;
 - (ii) *Torture of all kinds, whether physical or mental;*
 - (iii) Corporal punishment; and
 - (iv) Mutilation; [as well as]
- (b) Outrages upon personal dignity, *in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;*....

The United States is not one of the 146 States Parties to the Additional Protocol I—for reasons that have nothing to do with Article 75. But the International Court of Justice has found that Article 75 reflects "fun-

damental general principles of international humanitarian law" and a "minimum yardstick" for all armed conflicts.⁴⁸

Support for the U.S. position can be found in the contemporaneous memorandum of the Secretary of State criticizing the Department of Justice and White House advice that the President Bush was receiving and on which the President eventually relied.⁴⁹ Secretary of State Colin Powell said:

I am concerned that the draft does not squarely present to the President the options that are available to him. Nor does it identify the significant pros and cons of each option.

Among the con arguments that Secretary Powell identified were the following with regard to the proposed view that the Geneva Convention does not apply to the conflict:

It will reverse over a century of U.S. policy and practice in supporting the Geneva conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general.

It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy.

It will undermine public support among critical allies, making military cooperation more difficult to sustain.

Europeans and others will likely have legal problems with extradition or other forms of cooperation in law enforcement, including in bringing terrorists to justice.

It may provoke some individual foreign prosecutors to investigate and prosecute our officials and troops.

President Bush in his February 7, 2002, statement had one further rationale for deny-

ing the al Qaeda and Taliban detainees status as prisoners of war under Article 4 of the Geneva Conventions, which he stated as follows:

Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.

The Geneva Conventions identify four major kinds of participants in international armed conflicts. First, there are combatants who have the privilege of using violence against each other. Second, there are prisoners of war who are former combatants but are detained and thus no longer in the conflict. They are given extensive protections under the Third Geneva Convention, but they may be questioned and may even be subjected to criminal prosecution for war crimes. A war crime, however, does not include attacking the enemy during armed conflict. Third, there are civilians who are protected under the Fourth Geneva Convention from attack, but may be detained under administrative order for periods of six months at a time, may be questioned, and may be prosecuted for criminal offenses. Finally, in the Fourth Geneva Convention, there is a brief mention of spies and saboteurs, who are subject to the protections afforded civilians except that they may also be deprived of only one relevant right, that is, the right to communication with the outside world.⁵⁰

There is no category of "unlawful combatants" in the Geneva Conventions, and the Geneva Conventions are intended to be comprehensive in their application—omitting

protection for no one. If there is any doubt as to whether a former combatant qualifies as a prisoner of war, Article 5 of the Third Geneva Convention indicates that there must be an individual determination of whether he qualifies as a POW. Until that determination is made, the individual must be treated as a POW. With regard to the question of whether an individual may be subjected to torture or ill-treatment, however, the issue of whether a detainee qualifies as a POW is really irrelevant—a complete red herring. Under both the Geneva Conventions and under customary international humanitarian law, the detainees in Afghanistan, Guantánamo, and Iraq are entitled at least to fundamental protections against torture and ill-treatment.

Application of the Human Rights Prohibition of Torture and Ill-Treatment to the United States with regard to al Qaeda, Taliban, and Iraqi Detainees

In his February 7, 2002 statement about the treatment of al Qaeda and Taliban, President Bush did not even mention the Civil and Political Covenant or the Convention against Torture. President Bush relied upon the Department of Justice memorandum of January 22nd that also omitted reference to human rights law. As we have already noted, international human rights law, reflected in the Civil and Political Covenant and the Convention against Torture, forbids torture and ill-treatment of anyone. That prohibition applies not only in times of peace but even in times of national emergency threatening the life of the nation, such as a war or a terrorist attack.

After President Bush made his statement about the February 2002 treatment of al Qaeda and Taliban, politically-appointed lawyers at the Justice Department have sought in a series of once secret, but now leaked memos to justify their failure even to mention

human rights treaties. What arguments did they make?

In a memorandum of August 1, 2002, the Office of Legal Council purported to analyze the Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A. Sections 2340-2340A are two statutes that were adopt-

There is no category of "unlawful combatants" in the Geneva Conventions, and the Geneva Conventions are intended to be comprehensive in their application—omitting protection for no one.

ed by the United States to fulfill its treaty obligations under the Convention Against Torture to subject torturers to criminal sanctions. The approach of the Office of Legal Counsel (OLC) was to give advice as to how U.S. interrogators could avoid being subjected to prosecution under the two statutes. Instead, the OLC lawyers should have asked the question: How can the U.S. comply with its treaty obligations to prevent torture and ill-treatment? If you were asked by the Minneapolis Police to give advice on interrogation of suspects, would you narrow the question to only: How can you avoid being prosecuted for your conduct? You would fulfill your function more effectively by focusing on the need to prohibit incommunicado detention, avoiding exclusive reliance on confessions to prove guilt, using video cameras in places where detainees are held or transported, training, and other measures that would help prevent torture and ill-treatment.

The August 2002 OLC memo also focused exclusively on an extremely narrow definition of torture—omitting any discussion of cruel, inhuman, or degrading treatment or punish-

ment. You will recall that the U.S. interposed an understanding and a reservation to the Convention against Torture—the understanding narrowed the definition of torture and the reservation narrowed the definition of "cruel, inhuman or degrading treatment or punish-

ment to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."

The OLC memo also narrows the kind of intent required to say "pain must be the defendant's precise objective." It would not be

The OLC's extremely narrow definition of torture . . . was withdrawn by the Justice Department sometime during fall 2004 and was replaced in a memo . . . just prior to the confirmation hearings of Alberto Gonzalez who had been the recipient of the August 2002 memo.

ment." Rather than maintaining the substance of those two limitations, the August 2002 OLC memo attempted to narrow the prohibited torture and ill-treatment even further. For example, the August 2002 memo defined torture as follows:

Physical pain amounting to torture must be equivalent to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340 it must result in significant psychological harm of significant duration, e.g., lasting for months or even years.⁵¹

The August 2002 OLC memo failed to cite any authority in the Convention against Torture, its jurisprudence, or any other international interpretations of torture to justify that narrowly brutal requirement for extreme pain. You will recall that the Convention against Torture requires only "severe pain or suffering, whether physical or mental." The August 2002 OLC definition of torture, however, narrows this definition in several ways. Most important, it requires far more pain or suffering when it says "torture must be equiv-

alent to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."⁵² The U.S. reservation on ratification narrowed that definition by requiring that "an act must be specifically intended to inflict severe physical or mental pain or suffering." But the requirement of a precise objective of inflicting severe pain goes beyond that reservation and would conflict with the language of the Convention that anticipates several motivations for torture, that is, is "intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind...."

The OLC's extremely narrow definition of torture—particularly as to the threshold of pain required—was withdrawn by the Justice Department sometime during fall 2004 and was replaced in a memo of December 31, 2004—just prior to the confirmation hearings of Alberto Gonzalez who had been the recipient of the August 2002 memo.

One aspect of the U.S. position, however, has not changed, that is, the failure effectively

to prohibit "cruel, inhuman or degrading treatment or punishment" as required by the Civil and Political Covenant and the Convention against Torture. International jurisprudence in several cases has viewed torture as an extreme form of cruel, inhuman, or degrading treatment or punishment. Essentially, the difference has focused on the intent of the actor whereby a perpetrator who intends to inflict severe pain and suffering will be considered to have committed torture. The distinction may also deal with the severity of the pain inflicted. It should be recalled, however, that both torture and cruel, inhuman, or degrading treatment or punishment are forbidden.

The U.S. sought to narrow its obligation in that respect by referring in its reservations to the meaning of "the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States." The U.S. explained its reservation at the time by stating that "cruel, inhuman or degrading treatment or punishment" might be too vague to be applied in the U.S. It is unclear to what extent the content of the Fifth, Eighth, and Fourteenth Amendments have been interpreted in a way significantly different from the content of the treaty prohibition against "cruel, inhuman or degrading treatment or punishment." My initial research reflects several propositions: First, the Fifth and Fourteenth Amendments prohibit conduct that shocks the conscience of the court. The leading case dealt with a suspect who had appeared to swallow drugs and the police had pumped his stomach in order to obtain proof of his drug possession.⁵³ The Supreme Court found that conduct to be shocking to their conscience, although the Court later found that a required blood test to prove alcohol consumption was not shocking.⁵⁴ One cannot be sure, however, that the "shock the conscience" test provides much greater precision than the cruel, inhuman, or degrading treatment standard.

A second proposition is that the Eighth Amendment's prohibition of cruel and unusual punishment applies only to sanctions imposed after a trial. Since none of the al Qaeda and Taliban detainees have been subjected to a trial, the Eighth Amendment would not apply.

A third concern is that the Fifth, Eighth, and Fourteenth Amendments may only apply to conduct within the territory of the United States or its jurisdiction. There are some Supreme Court cases that have applied the Constitution to court-martial proceedings at U.S. military bases abroad.⁵⁵ The June 2004 Supreme Court decision in *Rasul v. Bush*⁵⁶ permitted detainees in Guantánamo to file habeas corpus petitions in U.S. courts, but that decision was based on an interpretation of the habeas statute rather than the Constitution. The U.S. has taken the position that the Covenant on Civil and Political Rights applies only within the territory of the U.S., but the Human Rights Committee has repeatedly indicated that each State Party is responsible for protecting the rights of all persons "within the power or effective control of that State Party, even if not situated within the territory of the State Party."⁵⁷ The Convention against Torture and the Geneva Conventions are also applicable to the conduct of governments wherever they exercise their authority.

Whatever the content of the Fifth, Eighth, and Fourteenth Amendments and the impact of the U.S. reservations, the U.S. is still obligated by the Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to prevent not only torture but also some kinds of ill-treatment. Hence, it is particularly troubling to note that the various OLC memos focus entirely on an extremely narrow definition of torture. Similarly, when U.S. officials say that torture is inconsistent with American values, it calls into question all the methods of ill-treatment

that U.S. military forces have been authorized by the Secretary of Defense and other high level officials to use. While one or two of these forms of ill-treatment might not constitute torture by themselves, they reflect a climate of impunity. For example, a memo citing the legal arguments from February and August 2002 and signed by Secretary of Defense Donald Rumsfeld on December 2, 2002 authorizes interrogation techniques for detainees in Guantánamo, including:

- (1) identifying the interrogator as coming from a country with a reputation for harsh treatment of detainees;
- (2) the use of stress positions (like standing), for a maximum of four hours (there is no indication, however, how often that stress positions may be repeated or how much time the detainee would have between the use of techniques.⁵⁸ Also, Secretary Rumsfeld in approving the document handwrote a complaint: "However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?");
- (3) use of the isolation facility for up to 30 days with extensions to be approved by the Commanding General;
- (4) deprivation of light and auditory stimuli;
- (5) hooding;
- (6) use of 20-hour interrogations;
- (7) removal of all comfort items (including religious items);
- (8) removal of clothing;
- (9) forced grooming (shaving of facial hair, etc.);
- (9) use of detainees' individual phobias (such as fear of dogs) to induce stress;
- (10) in some cases, use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family;
- (11) exposure to cold weather or water;
- (12) use of a wet towel and dripping water to induce the misperception of suffocation, etc. In addition, the CIA was reportedly given permission by the Justice Department to use "waterboarding," the practice of forcing the detainees head under water for prolonged periods of time.⁵⁹

These techniques can be used cumulatively or all at once. If used together, and for long periods of time, these techniques constitute torture. Many of the detainees in Guantánamo have been held for more than two or three years. It is no wonder that there have been dozens of attempted suicides among the detainees. Interviews and statements by released detainees indicate that violent beatings have periodically occurred against groups or individual detainees by military guards. Interviews with released detainees, reports of human rights monitoring groups, and journalists' accounts reveal that many of the interrogation methods approved and implemented first in Guantánamo were exported to detention facilities in Afghanistan and Iraq.

Rumsfeld's interrogation policy issued on December 2, 2002 contained techniques that were beyond those permitted by the Army's Field Manual 34-52, which contains the interrogation guidelines in conformity with the Geneva Conventions. The field manual established more restrictive interrogation rules, for example, prohibiting pain induced by chemicals or bondage; forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time; and food deprivation. Under psychological torture, the manual prohibited mock executions, sleep deprivation, and chemically induced psychosis.⁶⁰

In December 2002 and January 2003, the Federal Bureau of Investigation (FBI)⁶¹ and Judge Advocates⁶² complained to the Defense Department about aggressive interrogation methods that were resulting in abuse and several deaths. In January 2003, Secretary of

Defense Rumsfeld rescinded his blanket approval of the techniques he had authorized in December 2002. Instead, requests for using the harshest interrogation methods were to be forwarded directly to him, along with a "thorough justification" and "a detailed plan for the use of such techniques."⁶³

In addition, Rumsfeld established a Working Group to assess legal and policy issues for detainee interrogation. The Working Group's report was sent to Rumsfeld on April 4, 2003,⁶⁴ recommending 35 interrogation techniques, many of which seemed to mirror Rumsfeld's December 2002 guidelines, including hooding, prolonged standing, sleep deprivation, face slap/stomach slap, and removal of clothing in order to create a feeling of vulnerability.⁶⁵ The Working Group reasoned that "[d]ue to the unique nature of the war on terrorism...it may be appropriate...to authorize as a military necessity the interrogation of such unlawful combatants in a manner beyond that which may be applied to a prisoner of war who is subject to the protections of the Geneva Conventions." On April 16, 2003, Rumsfeld approved 24 of the techniques recommended by the Working Group, including dietary and environmental manipulation, sleep adjustment, and isolation.⁶⁶ Again, some of these techniques were clearly inconsistent with the Army Field Manual that had been used since 1987.

In August 2003, Major General Geoffrey Miller, who had been responsible for interrogations in Guantánamo, was sent to Iraq to "gitmo-ize" Iraqi detention facilities, or according to a subsequent inquiry by Major General Antonio M. Taguba, Miller's task was "to review current Iraqi Theater ability to rapidly exploit internees for actionable intelligence." Miller reportedly suggested that prison guards be used to "soften up" prisoners for interrogations, and it is now known that he was often present at Abu Ghraib.⁶⁷ In September 2003, Lt. General Sanchez author-

ized 29 interrogation techniques (mirroring Rumsfeld's April 16 techniques) for use in Iraq, including the use of dogs, stress positions, sensory deprivation, loud music, and light control.⁶⁸

Since January 9, 2002—the day the Department of Justice lawyers sent that first memo to the Pentagon arguing that the Geneva conventions do not apply to the war in Afghanistan, or to members of al-Qaeda or the Taliban—until the present, numerous accounts of detainee abuse and some deaths have been reported. In May 2003, the International Committee of the Red Cross (ICRC) reported to U.S. Central Command 200 cases of alleged detainee abuse in U.S. custody in Iraq, and continued to express concern confidentially about the abuse of the detainees throughout 2003.⁶⁹ In December 2003, a secret U.S. Army report detailed abuses committed by a task force of Military Operations and CIA officers, known as Task Force 121 against detainees in Iraq.⁷⁰ On January 13, 2004, Joseph Darby gave Army criminal investigators a CD containing the Abu Ghraib photographs depicting detainee torture and abuses that had occurred from September to December 2003. On February 24, 2004, the ICRC issued a confidential report to the Coalition Provisional Authority documenting widespread abuse in various detention facilities in Iraq and command failures to take corrective action. The report was eventually leaked, revealing that the ICRC had observed abusive methods being used at Camp Cropper in Iraq, including "hooding a detainee in a bag, sometimes in conjunction with beatings, thus increasing anxiety as to when blows would come"; applying handcuffs so tight the skin would be broken; beating with rifles and pistols; issuing threats against family members; and stripping detainees naked for several days in solitary confinement in a completely dark cell.⁷¹ During its Press Conference on May 7, 2004,

a representative of the ICRC said that "what appears in the report of February 2004 are observations consistent with those made earlier on several occasions orally and in writing throughout 2003. In that sense the ICRC has repeatedly made its concerns known to the Coalition Forces and requested corrective measures prior to the submission of this particular report."⁷²

Two days after the ICRC report was transmitted, Maj. Gen. Taguba completed an informal investigation of the detention and internment operations in Iraq, reporting "systematic" and "sadistic, blatant and wanton criminal abuses" at Abu Ghraib.⁷³ Examples of detainee treatment from the Taguba report include: "Breaking chemical lights and pouring the phosphoric liquid on detainees; pouring cold water on naked detainees; beating detainees with a broom handle and a chair; threatening male detainees with rape; allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell; sodomizing a detainee with a chemical light and perhaps a broom stick, and using military dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee."⁷⁴ Further, Taguba reported that the CIA kept some detainees in Abu Ghraib prison off the official rosters. This practice of allowing "ghost detainees" at the prison was, in Taguba's words, "deceptive, contrary to Army Doctrine, and in violation of international law." He concluded that the purpose of this practice was to hide the prisoners from the Red Cross.⁷⁵

Following the Taguba Report, which indicated that the abuses that occurred at Abu Ghraib were not isolated events, the Pentagon initiated a number of investigations, including the "Schlesinger Panel," the Fay-Jones Report, and the Church Report. Nearly all of these reports, however, involved the military investigating itself. In addition, all of the

investigators placed the blame on lower-level troops, claiming to find no evidence that senior U.S. officials played a direct role in ordering the abuses, even though secret memos revealed that senior officials and several generals were responsible for giving instructions that resulted in torture.⁷⁶ The investigators' sharpest criticism, perhaps, was that senior officials had created conditions for the abuse to occur. The "Schlesinger Panel," for example, stated that the abuse occurred due to confusion in the field as to what techniques were authorized.⁷⁷ Further, the "Church Report" concluded that there was "no single, overarching explanation" for the "few" cases in which detainees had not been treated humanely, and that "there is no link between approved interrogation techniques and detainee abuse."⁷⁸

On March 3, 2005, pursuant to litigation by the American Civil Liberties Union (ACLU) under the Freedom of Information Act, the Army released more than 1,000 pages of criminal investigations. Among the facts included in the documents are one undetermined manner of death, three justifiable homicides, one alleged rape, one alleged larceny, and seven alleged assaults or cruelty and maltreatment. The allegations and circumstances in each of these 13 cases were investigated and the cases were closed; however, the investigations failed to result in any criminal charges.⁷⁹ On March 16, 2005, the Army reported to the *New York Times* that 26 deaths of inmates in Afghanistan and Iraq might be cases of homicide.⁸⁰ Although this statistic is certainly a warning signal, it is not conclusive because of the lack of information regarding the circumstances of those deaths.

Conclusion

Although the U.S. government has claimed that incidents of detainee abuse have been isolated to a few weeks at Abu Ghraib and blamed the abuse on a handful of low-level and poorly trained officers, the evidence indi-

cates that torture and ill-treatment in Guantánamo and later in Afghanistan, Iraq, and other military facilities were authorized or at least condoned by high-level officials beginning in 2002 and continuing even after investigations of the abuses at Abu Ghraib. In fact, the secret legal memoranda exchanged by senior White House and Justice Department lawyers since 2001 indicate a deliberate and carefully constructed framework for circumventing international law restraints on the treatment of detainees.

As former Secretary of State Colin Powell observed with regard to the policies proposed to President Bush in February 2002 and that have resulted in torture and ill-treatment of detainees, the use of torture and ill-treatment will undermine the protections of the law of war for our troops, both in this specific conflict and in general. It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy. It will undermine public support among critical allies, making military cooperation more difficult to sustain. Europeans and others will likely have legal problems with extradition or other forms of cooperation in law enforcement, including in bringing terrorists to justice. It may provoke some individual foreign prosecutors to investigate and prosecute our officials and troops.

The struggle to end torture and other cruel, inhuman, or degrading treatment by the United States is the single most important international human rights concern of our day. If the United States continues its use of torture and other serious forms of ill-treatment as well as its practice of transferring detainees to nations that are known to engage in such torture and ill-treatment, the U.S. will undermine the credibility not only of the international prohibitions against such grave abuses, but threatens the credibility of all international human rights treaties and institutions.

If the most powerful country in the world

resorts to torture and ill-treatment violating its most solemn international commitments, how can other nations be expected to comply with fundamental human rights obligations? ■

Endnotes

¹ Regents Professor and Fredrikson & Byron Professor of Law, University of Minnesota. © 2005 David Weissbrodt.

² Glenn Kessler and Josh White, "Rice Seeks to Clarify Policy on Prisoners," *Washington Post*, Dec. 8, 2005, at A1. Available at <http://www.washingtonpost.com/wp/dyn/content/article/2005/12/07/AR2005120700215.html>.

³ The author wishes to acknowledge the very significant intellectual debt he owes in preparing this article to Professor Nigel Rodley and the remarks Prof. Rodley presented to the American Society of International Law in April 2005, entitled "Torture, Violence and the 'Global War on Terror'" as well as his presentation at the University of Minnesota Law School on September 22, 2004. In addition, the author expresses his appreciation to the following individuals for their contributions to this article: Professor Barbara Frey, Nicholas Velde, Rochelle Hammer, and Bridget Marks.

⁴ Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950.

⁵ Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950.

⁶ Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950, Art. 130.

⁷ *Id.* Art. 129.

⁸ *Id.* Art. 3.

⁹ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

¹⁰ *Lucia Arzuada Gilboa v. Uruguay*, Communication No. 147/1983, U.N. Doc. Supp. No. 40 (A/41/40) at 128 (1986). available at <http://www1.umn.edu/humanrts/undocs/session41/147?1983.htm>.

¹¹ *Delia Saldías de Lopez v. Uruguay*, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1 at 88 (1984). available at http://www1.umn.edu/humanrts/undocs/html/52_1979.htm.

¹² *Linton v. Jamaica*, Communication No. 255/1987, U.N. Doc. CCPR/C/46/D/255/1987 (1992). available at <http://www1.umn.edu/humanrts/undocs/html/dec255.htm>.

¹³ *Esther Soriano de Bouton v. Uruguay*, Communication No. 37/1978, U.N. Doc. CCPR/C/OP/1 at 72 (1984). available at http://www1.umn.edu/humanrts/undocs/html/37_1978.htm.

¹⁴ *El-Megreisi v. Libyan Arab Jamahiriya*, Communication

No. 440/1990, U.N. Doc. CCPR/C/50/D/440/1990 (1994). available at <http://www1.umn.edu/humanrts/undocs/html/vws440.htm>.

¹⁵ F. Birindwa ci Bithashwiwa, *E. Tshisekedi wa Mulumba v. Zaire*, Communication Nos. 241/1987 and 242/1987, U.N. Doc. CCPR/C/37/D/242/1987 (1989). available at <http://www1.umn.edu/humanrts/undocs/session37/241?1987.html>.

¹⁶ See Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1490-97 (2004); see also Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional*, 88 YALE L.J. 1011 (2003).

¹⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.

¹⁸ Conclusions and recommendations of the Committee against Torture, Israel, U.N. Doc. A/52/44, paras. 253-260 (1997). available at <http://www1.umn.edu/humanrts/cat/observations/israel1997.html>. See also Conclusions and recommendations of the Committee against Torture, Republic of Korea, U.N. Doc. A/52/44, paras. 44-69 (1996). available at <http://www1.umn.edu/humanrts/cat/observations/korea1996.html>. Conclusions and recommendations of the Committee against Torture, New Zealand, U.N. Doc. A/48/44, paras. 133-160 (1993). available at <http://www1.umn.edu/humanrts/cat/observations/newzealand1993.html>. Inquiry under Article 20: Committee Against Torture, Findings concerning Peru (2001), U.N. Doc. No. A/56/44, at para. 35.

¹⁹ 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively. available at <http://www1.umn.edu/humanrts/instruc/z17euroco.html>.

²⁰ *Ireland v. United Kingdom*, Case No. 5310/71, Judgment of the Eur. Ct. H.R., 18 January 1978, para. 167.

²¹ *Id.*, para. 162.

²² Language of the Commission as quoted in Nigel S. Rodley, *The Treatment of Prisoners under International Law* (Oxford 2000), at 91-92. Many commentators have found the Commission's view to be more persuasive than the Court's. See Rodley's discussion at 90-95.

²³ *Ilhan v. Turkey*, Case No. 22494/93, Judgment of the Eur. Ct. H.R., 27 June 2000, para. 85.

²⁴ *Tyrer v. United Kingdom*, Case No. 5856/72, Judgment of the Eur. Ct. H.R., 25 April 1978, para. 29.

²⁵ *Selmouni v. France*, Case No. 25803/94, Judgment of the European Court of Human Rights, July 28, 1999.

²⁶ *Id.*

²⁷ *Tomasi v. France*, Case No. 12850/87, Judgment of the Eur.

Ct. H.R., 27 August 1992. See also *Ribitsch v. Austria*, Case No. 18896/81, Judgment of the Eur. Ct. H.R., 4 December 1995.

²⁸ For example, see *Zhu v. the United Kingdom*, No. 36790/97, Judgment of the Eur. Ct. H.R., 12 September 2000. See also *Assenov v. Bulgaria*, Case No. 24764/94, Judgment of the Eur. Ct. H.R., 28 October 1998.

²⁹ *Soering v. United Kingdom*, Case No. 14038/88, Judgment of the Eur. Ct. H.R., 7 July 1989.

³⁰ *Cruz Varas et al. v. Sweden*, Case No. 15576/89, Judgment of the Eur. Ct. H.R., 20 March 1991. *Vilvarajah et al. v. United Kingdom*, Case No. 13163/87, Judgment of the Eur. Ct. H.R., 30 October 1991.

³¹ *Chahal v. the United Kingdom*, Case No. 22414/93, Judgment of the Eur. Ct. H.R., 15 November 1996.

³² *Aksoy v. Turkey*, Case No. 21987/93, Judgment of the Eur. Ct. H.R., 18 December 1996.

³³ *Aydin v. Turkey*, Case No. 23178/94, Judgment of the Eur. Ct. H.R., 25 September 1997.

³⁴ *Selmouni v. France*, Case No. 25803/94, Judgment of the Eur. Ct. H.R., 28 July 1999.

³⁵ *Assenov v. Bulgaria*, Case No. 24760/94, Judgment of the Eur. Ct. H.R., 28 October 1998.

³⁶ 2187 U.N.T.S. 3, entered into force July 1, 2002.

³⁷ Restatement of the Law—Foreign Relations Law of the United States Restatement (Third) of Foreign Relations Law of the United States § 702 (2005) (emphasis added).

³⁸ U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992).

³⁹ U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).

⁴⁰ Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/79/Add.50, A/50/40 (1995).

⁴¹ Conclusions and Recommendations of the Committee against Torture: United States of America, 15/05/2000, U. Doc. A/55/44, paras. 175-180 (Concluding Observations/Comments).

⁴² United States of America, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, U.N. Doc. CAT/C/28/Add.5 paras. 303-04 (2000).

⁴³ President George W. Bush to the Vice President, Secretary of State, Secretary of Defense, Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs and Chairman of the Joint Chiefs of Staff, memorandum,

"Humane Treatment of al Qaeda and Taliban Detainees," February 7, 2002. available at http://www.humanrightsfirst.org/us_law/etn_gonzales/memos_dir/dir_20020207_Bush_Det.pdf.

⁴⁴ The Department of Justice concluded that the President had the authority to suspend application of the Geneva Conventions with regard to Afghanistan because Afghanistan was a failed state and thus unable to comply with its treaty obligations. That view would undermine the global protective nature of the Geneva Conventions and would open the door for many other countries to seek excuses for avoiding their fundamental obligations under humanitarian law. As a factual matter the Justice Department conclusion was highly questionable at the time that it was rendered and would be unsustainable at the present time. President Bush, in any case, declined to exercise his supposed authority to suspend application of the Geneva Conventions with regard to Afghanistan.

⁴⁵ Jean S. Pictet, Geneva Conventions of 12 August, 1949: Commentary 36 (1958).

⁴⁶ *Id.* 49-50; David Weissbrodt, *The Role of International Organizations in the Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict*, 21 Vanderbilt J. Int'l L. 313, 339-40 (1988).

⁴⁷ Additional Protocols I and II to the Geneva Conventions of 12 August 1949, 1125 U.N.T.S. 3, 609, entered into force Dec. 7, 1978.

⁴⁸ The U.S. Judge Advocate General's Operational Law Handbook considers Article 75 as one of the large number of Geneva Convention and Additional Protocol provisions that are "either legally binding as customary international law or acceptable practice though not legally binding."

⁴⁹ Colin L. Powell, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (January 26, 2002).

⁵⁰ Article 5 of the Fourth Geneva Convention: "Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention."

⁵¹ U.S. Department of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales, *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (August 1, 2002).

⁵² *Id.* at 3-4.

⁵³ In *Rochin v. People of California*, 342 U.S. 165 (1952), sheriffs found the door to the defendant's home ajar, entered the defendant's home, and forced his bedroom door open. They saw two pills on the nightstand near the defendant. They asked the defendant whose pills they were and he grabbed them up and put them in his mouth. Several officers

jumped on him in an effort to get the pills, but he managed to swallow them. The defendant was then taken to a hospital where his stomach was pumped and Morphine pills were recovered. This conduct violated the 14th Amendment because it shocked the conscience of the court. *Id.* at 172.

⁵⁴ In *Breithaupt v. Abram*, 352 U.S. 432 (1957), the Supreme Court held that a blood test taken from an unconscious man to test his blood alcohol level did not shock the conscience when performed by a skilled technician. The defendant had been driving his pickup truck and struck another vehicle head-on killing the other driver. An empty whiskey bottle in the truck and the smell of alcohol on the driver motivated the Emergency Room staff to call the sheriff who requested the test. The test showed the driver was above the legal limit for blood-alcohol. The defendant argued under *Rochin* and lost.

⁵⁵ *Trop v. Dulles*, 356 U.S. 86 (1958).

⁵⁶ 124 S.Ct. 2686 (2004) (the Supreme Court held that the *habeas corpus* statute, 28 U.S.C.A. § 2241, provided jurisdiction for twelve Kuwaiti citizens and two Australian nationals captured in Afghanistan to challenge their detention at the Guantánamo Bay Naval Base in Cuba. The Court avoided any constitutional or international law issues at stake in the case.) In *Hamdan v. Rumsfeld*, No. 04-5393, slip op. (D.C. Cir. July 15, 2005) at <http://caselaw.lp.findlaw.com/data2/circs/dc/045393a.pdf>, the Court of Appeals rejected the constitutional and international claims of a Guantánamo detainee against military commissions.

⁵⁷ Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 10; <http://www1.umn.edu/humanrts/gencomm/hrcom31.html>.

⁵⁸ William J. Haynes II, General Counsel of the Department of Defense, Action Memo for Secretary of Defense (November 27, 2002), Approved by Secretary of Defense (December 2, 2002).

⁵⁹ Human Rights Watch, "Getting Away with Torture: Command Responsibility for the U.S. Abuse of Detainees" 12 (April 2005).

⁶⁰ Further, the U.S. Army Intelligence Interrogation Field Manual (FM 34-52) states, "[the Geneva Conventions] and U.S. policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation. Such illegal acts are not authorized and will not be condoned by the U.S. Army. Acts in violation of these prohibitions are criminal acts punishable under the [Uniform Code of Military Justice]." The Field Manual (FM 34-52) is available in its entirety at <http://www.globalsecurity.org/intell/library/policy/army/fm/fm3452/>. Field Manual 34-52 was issued in 1987 and the Army announced in April 2005 that it would be replaced by a new interrogation manual. Although the new manual remains confidential, the press reported that the new manual specifically forbids practices that were portrayed in the Abu Ghraib photos, such as stripping prisoners,

keeping them in "stress" positions, imposing dietary restrictions, employing police dogs to intimidate prisoners, and using sleep deprivation as an interrogation method. While human rights groups have acknowledged that the new manual is an improvement from 34-52, some have expressed concern that the manual is only applicable to the Army, and not for other military or intelligence operations, such as the CIA. Eric Schmitt, *Army, in manual, limiting tactics in interrogations*, *New York Times*, April 28, 2005.

⁶¹ In a letter obtained by *The Associated Press*, Thomas Harrington, an FBI counterterrorism expert suggested the Pentagon did not act on FBI complaints about several incidents that occurred in Guantanamo, including a female interrogator grabbing a detainee's genitals and bending back his thumbs, another where a prisoner was gagged with duct tape, and a third where a dog was used to intimidate a detainee who later was thrown into isolation and showed signs of "extreme psychological trauma." Paisley Dodds, "FBI letter complains of aggressive interrogation techniques at Guantanamo starting in 2002," *Associated Press*, December 6, 2004. The ACLU has obtained a number of emails documenting the interrogation techniques and abuse observed by FBI agents. *available at* <http://www.aclu.org/International/International.cfm?ID=13962&c=36>.

⁶² James Gordon Meek, "At war with Gitmo grilling: Military counsel fought and lost," *New York Daily News*, February 13, 2005.

⁶³ Memo from Secretary of Defense Rumsfeld to General Counsel, U.S. Dept. of Defense (January 15, 2003). *available at* <http://news.findlaw.com/hdocs/docs/dod/rums11503mem.pdf>.

⁶⁴ *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*. The Working Group was chaired by Mary L. Walker, General Counsel, U.S. Air Force. *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf>.

⁶⁵ The U.S. Army Intelligence Interrogation Field Manual (FM 34-52) states, "[the Geneva Conventions] and U.S. policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation. Such illegal acts are not authorized and will not be condoned by the U.S. Army. Acts in violation of these prohibitions are criminal acts punishable under the [Uniform Code of Military Justice]." The Field Manual (FM 34-52) is available in its entirety at <http://www.globalsecurity.org/intell/library/policy/army/fm/fm34752/>.

⁶⁶ "Counter-Resistance Techniques in the War on Terrorism," memo from the Secretary of Defense for the Commander U.S. Southern Command (April 16, 2003). *available at* <http://www.defenselink.mil/news/Jun2004/d20040622doc9.pdf>.

⁶⁷ Eric Schmitt, "Official Declines to Pin Blame for Blunders in Interrogations," *New York Times*, March 11, 2005.

⁶⁸ Memo from Lt. Gen. Ricardo S. Sanchez to Commander, U.S. Central Command (September 14, 2003). *available at* <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17851&c=206>.

⁶⁹ Human Rights Watch, "The Road to Abu Ghraib," June 2004, p. 30.

⁷⁰ Josh White, "U.S. Generals in Iraq Were Told of Abuse Early, Inquiry Finds," *Washington Post*, December 1, 2004.

⁷¹ "Report of the International Committee of the Red Cross (ICRC) on the treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during arrest, internment and interrogation," February 2004. *available at* <http://www.information-clearinghouse.info/article6170.htm>.

⁷² For a transcript of the press conference, *see* <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/iraq?OpenDocument#Press%20briefing>.

⁷³ Major General Antonio M. Taguba, Article 15-6 Investigation of the 800th Military Police Brigade, February 26, 2004. *available at* <http://news.findlaw.com/cnn/docs/iraq/tagubarpt.html>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ On May 6, 2005, Brig. Gen. Janis Karpinski of the Army Reserve was demoted to colonel and relieved of command of the 800th Military Police Brigade. Karpinski commanded detention operations at Abu Ghraib prison during the time the now-famous photos of abuse were taken. On May 12, 2005, the U.S. Army found Col. Thomas Pappas, the officer whose military intelligence unit was in charge of interrogations at the Abu Ghraib prison, guilty of two counts of dereliction of duty and was subsequently reprimanded and fined \$8,000.

⁷⁷ "Final Report of the Independent Panel to Review DoD Operations," also called the "Schlesinger Panel," August 24, 2004. *available at* <http://news.findlaw.com/wp/docs/dod/abughraibrpt.pdf>.

⁷⁸ U.S. Department of Defense, "Executive Summary," available to the public since March 2005, the "Church Report." (Only 21 pages of 400 are declassified.) *available at* <http://www.defenselink.mil/news/Mar2005/d20050310exec.pdf>.

⁷⁹ Documents *available at* <http://www.aclu.org/International/International.cfm?ID=13962&c=36>.

⁸⁰ Douglas Jehl and Eric Schmitt, "U.S. Military Says 26 Inmate Deaths May Be Homicide," *New York Times*, March 16, 2005.